

Before the  
Federal Communications Commission  
Washington, D. C. 20554

FCC 83-517  
34018

In the Matter of )  
 )  
Access to Telecommunications ) CC Docket No. 83-427  
Equipment by the Hearing )  
Impaired and other Disabled Persons )

MEMORANDUM OPINION AND ORDER

Adopted November 8, 1983 ; Released November 25, 1983

By the Commission:

I. INTRODUCTION

1. On January 3, 1983, the President signed into law the Telecommunications for the Disabled Act of 1982, Pub. L. 97-410 (to be codified as 47 U.S.C. § 610). In subsection (g) of the Act, Congress created an exception to the Commission's Computer II decisions 1/ by permitting carriers to provide "specialized terminal equipment" or customer premises equipment ("specialized CPE") under tariff or otherwise to disabled persons in need of such equipment and permitting states to conduct programs whereby specialized CPE would be subsidized through revenues received from rates for tariffed communications services. The Act also requires the Commission to adopt regulations to ensure hearing impaired persons "reasonable access" to telephone service and to provide that certain "essential telephones" be usable with hearing aids.

INFORMATION

2. On May 4, 1983, we released a Notice of Proposed Rulemaking (NPRM), 48 Fed. Reg. 20771, designed to implement the Act. Congress has required that we adopt final rules by January 3, 1984, and we will do so. Nevertheless, one issue regarding the implementation of the Act requires resolution now in order to avoid confusion concerning the availability of CPE to the disabled immediately after the planned divestiture of the Bell System Operating Companies (BOCs) from the American Telephone and Telegraph Company (AT&T) on January 1, 1984

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1/ Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (Final Decision), reconsideration, 84 FCC 2d 50 (1980), further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 2109 (1983).

pursuant to the Modification of Final Judgment (MFJ) issued in United States v. American Telephone and Telegraph Co. 2/ That issue is whether in light of Congress' action we should require the detariffing of specialized terminal equipment or instead leave the decision to the states. AT&T requests approval by us of a plan to detariff both embedded 3/ and new specialized CPE. In place of providing this equipment under tariff, AT&T proposes a three-year price predictability and sales plan similar in form to the plan it has proposed for the detariffing of embedded CPE generally. See AT&T's Supplementary Comments filed in CC Docket No. 81-893 (September 15, 1983).

3. Organizations representing the disabled 4/ have joined together to file a motion requesting expeditious resolution of the detariffing issue AT&T has raised and of other questions related to the implementation of the Act. These organizations believe it would be inconsistent with the Act for this Commission to order the detariffing of specialized CPE. They request that we reach this conclusion quickly, so that they may file a motion with the Court in the MFJ proceedings, requesting that embedded specialized CPE remain with the BOCs, rather than be transferred to AT&T as is currently planned. In response to this motion we are separating out the detariffing issue for treatment in advance of other implementation issues, which require more time, but in any event will be resolved before January 3, 1984. We find today that it would best further the purposes of the Act for this Commission to forego detariffing specialized CPE.

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2/ 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 103 S. Ct. 1240 (1983). AT&T's application with this Commission for authority to transfer ownership of facilities is currently under review. See File No. W-P-C-4955.

3/ Embedded CPE is CPE which was subject to the jurisdictional separations process as of January 1, 1983. See Further Reconsideration, 88 FCC 2d at 526. The Commission is considering the method for detariffing such equipment in the Implementation Proceeding, CC Docket No. 81-893, FCC 83-181 (released June 21, 1983). That proceeding will not treat specialized CPE which is subject to the provisions of the Telecommunications for the Disabled Act. Id. at para. 2 n.4.

4/ These organizations include: National Center for Law and the Deaf; National Association of the Deaf; Paralyzed Veterans of America; Alexander Graham Bell Association for the Deaf; American-Speech-Language-Hearing Association; American Council of the Blind; Self-Help for the Hearing-Handicapped; American Deafness and Rehabilitation Association; Disability Rights Center, Inc.; National Rehabilitation Association; Conference of Educational Administrators Serving the Deaf, Inc.; Convention of American Instructors of the Deaf.

## II. PLEADINGS OF THE PARTIES

4. AT&T argues that Congress has not precluded our detariffing of specialized CPE for the disabled. In support AT&T states that the NPRM indicated that the decision to tariff specialized CPE is initially for carriers to make; that the Act does not bar AT&T's plan; that Congress intended the free market to ensure a supply of specialized CPE, which detariffing would effectuate; and that states will be able to regulate specialized CPE if the price predictability plan does not produce satisfactory results. AT&T further argues that, whether or not the equipment is tarified, states can maintain programs to subsidize specialized CPE by collecting surcharges from customers of local exchange carriers and equipment vendors.

5. The National Association of Regulatory Utility Commissioners (NARUC), the National Association of the Deaf and the National Center for Law and the Deaf (Joint Commenters), the Organization for Use of the Telephone (OUT) and Walker Equipment Corporation (Walker) filed comments in opposition to AT&T. NARUC, the Joint Commenters and OUT assert that our approval of AT&T's request would violate the Act and contravene Congress' intention to vest with the states the power to tariff or detariff specialized CPE. GTE filed a reply asserting that the Act does not require specialized CPE to be tarified, pointing out that not all of its current offerings of specialized CPE are tarified.

## III. DISCUSSION

6. In our Computer II decisions, we ordered that all carrier-provided CPE be detarified and unbundled from the provision of regulated transmission service. 5/ Pursuant to Computer II, AT&T and its affiliates may provide CPE only through a separated subsidiary, and other common carriers, providing CPE, are required to keep books of account and records for the provision of new CPE separate from regulated records. 6/ In the Computer II decision on reconsideration, we stated that the "bundling of non-usage sensitive CPE into usage-sensitive rates for service is very likely to result in misallocation of costs among services and facilities offerings." 7/ Therefore, we concluded that certain ratepayers, through payments for transmission services, were potentially cross-subsidizing CPE used by other ratepayers, and that

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5/ 77 FCC 2d at 496 (para. 288).

6/ Id. at 497 (para. 290).

7/ 84 FCC 2d at 99 (para. 140); see 77 FCC 2d at 444-45 (para. 154).

such a situation was inconsistent with our policies fostering competition in the communications marketplace. This situation could only be remedied by unbundling and detariffing CPE. 8/ Accordingly, we expressly precluded state regulatory agencies from requiring the tariffing of "new CPE" after December 31, 1982, and left to another proceeding the question of when and under what conditions to detariff embedded CPE. 9/

7. Following our Computer II decisions, Congress enacted the Telecommunications for the Disabled Act to assure that hearing impaired persons obtain reasonable access to telephone service. More specifically, section 610(g) was designed to assure that equipment needed by the disabled to use telephone service would be available at affordable prices. Section 610(g) provides:

Any common carrier or connecting carrier may provide specialized terminal equipment needed by persons whose hearing, speech, vision, or mobility is impaired. The State commission may allow the carrier to recover in its tariffs for regulated service reasonable and prudent costs not charged directly to users of such equipment.

The Act does not address specifically whether this Commission can still order detariffing of specialized CPE or whether detariffing is left to the states; in fact, there is considerable ambiguity as to how the Congressional scheme is intended to work. We do know that the Act contemplates that state public utility commissions have the power to conduct programs whereby the costs of providing specialized CPE may be subsidized from revenues for regulated services. States may find that, in determining whether only reasonable and prudent costs of providing specialized CPE are included in revenue requirements, the tariffing of specialized CPE may be useful. On the other hand, a sales program, with or without subsidy, may be equally effective in meeting the needs of the hearing impaired in the future. Since we believe that the states themselves are in the best position to decide whether the tariff mechanism for providing CPE should play a part in any subsidy program they may adopt, we have decided to dismiss AT&T's proposal and leave decisions on this matter to the states.

8. As we recognized in the Notice in this proceeding, "in our view, the ... Act contemplates that this Commission leave to carriers and state commissions the decision whether or not specialized equipment will be tariffed ...." Notice at para. 33. The legislative history of the Act confirms this view:

In its Computer II decision, the Commission required that the provision by carriers of terminal equipment ... "be

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8/ 77 FCC 2d at 444-45 (paras. 154-156).

9/ 88 FCC 2d at 541 n.34; see 84 FCC 2d at 103 (para. 154).

separate and distinct from the provision of common carrier communications services and not offered on a tariffed basis." The detariffing of terminal equipment will cause competition to drive prices to costs and will effectively prevent the State commissions from regulating the price and other terms under which the consumer obtains terminal equipment. The Committee believes that, as applied to disabled persons, such a policy could lead to substantial price increases and reductions in the access to the nationwide network which persons with disabilities currently enjoy.

H.R. Rep. No. 97-888, 97th Cong., 2d Sess., at 13 (1982) (footnotes omitted) ("House Report").

9. In Congress' judgment states have been successful in overseeing the needs of disabled persons and Congress intended that the states be able to "continue programs that subsidize the provision of specialized terminal equipment to persons with physical disabilities." 10/ This language appears to contemplate that the states would have the discretion as to how specialized CPE is provided by carriers. Congress believed that the mandatory detariffing of specialized CPE could limit the states in conducting existing or future programs for the disabled. Therefore, we conclude that Congress believed it would better effectuate the Act to leave to the states the determination whether to tariff or detariff specialized CPE. We note that AT&T does not argue that this Commission may preempt state commissions from requiring the tariffing of specialized CPE. Indeed, AT&T acknowledges that states may take remedial regulatory action concerning specialized CPE should its price predictability plan not accomplish its purpose. AT&T Supplementary Comments at 2.

10. We conclude that leaving to the states the decision whether to detariff specialized CPE will best meet the purposes of the Act. Given this conclusion, we see no reason to pass judgment on AT&T's price predictability plan. We conclude that we should not allow our implementation of the Disabled Act to disrupt the current provision of specialized CPE. The approach which would be most consistent with the Act and less disruptive than AT&T's proposal would be to leave specialized CPE tariffed or untariffed, as the case may be in the various states, and let those states with existing tariff programs decide when and under what conditions to detariff specialized CPE, if at all.

11. We note, however, that the language of the Act is permissive, and the legislative history does not express a preference for whether specialized CPE should be eventually offered on a tariffed or detariffed basis. House Report at 14. Thus, AT&T correctly asserts that a carrier may initially choose whether or not to continue to offer equipment under tariff. Even though the initial decision whether to

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10/ House Report at 2.

tariff rests with the carrier, a carrier's exercise of that discretion may depend on its filing a detariffing plan with the appropriate state regulatory agency and obtaining approval. In other words, the Act affords state commissions the opportunity to determine, in an orderly fashion, whether the provision of specialized CPE pursuant to proposals such as AT&T's price predictability plan, is an appropriate way in which to provide equipment needed by disabled persons. Nevertheless, state action and the submission to the states of a plan by AT&T should await our adoption of rules implementing the Act. As noted, the Commission will adopt regulations no later than January 3, 1984.

12. Our decision here does not preclude AT&T from seeking at the appropriate time the detariffing of specialized CPE from state commissions. Although the price predictability plan is based on nationwide projections, AT&T may present its plan to individual states. We note AT&T's argument in the Implementation Proceeding that if CPE for consumers (including disabled customers) remained tariffed following divestiture, AT&T would be required to form an embedded base organization, which would cause it to incur substantial costs. AT&T Supplementary Comments, filed in the Implementation Proceeding, at 13-14 (October 28, 1982). In order to avoid the complexities and costs AT&T may face in dealing with many state commissions, AT&T and the BOCs may wish to negotiate an arrangement leaving specialized CPE with the BOCs. 11/ The BOCs have a greater presence in each state than AT&T, and have experience dealing with the procedures of the individual commissions.

#### IV. ORDERING CLAUSES

13. THEREFORE, the Motion for Expedited Consideration filed August 23, 1983, by National Center for Law and the Deaf, et. al., IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED HEREIN.

14. IT IS FURTHER ORDERED that the price predictability and sales plan filed September 15, 1983 by the American Telephone and Telegraph Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico  
Secretary

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11/ A memorandum written by the Court in the MFJ proceedings indicates that "[t]he Court's approval of the decree's provisions regarding embedded CPE is ... without prejudice to whatever equitable arrangements may be made among AT&T, the operating companies, and the representatives of the disabled regarding continued subsidization of [specialized] equipment." Memorandum from Judge Harold Greene at ¶6 (August 5, 1983).